

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.35 Medical Malpractice—Expert Testimony

B. Standard of Care

Immediately before subsection (C) on page 97, insert the following case summary:

In *McElhaney v Harper-Hutzel Hosp*, ___ Mich App ___ (2006), the Court of Appeals affirmed the grant of summary disposition in favor of defendant based on plaintiff's failure to establish a genuine issue of material fact regarding the standard of care applicable to a nurse midwife. In support of this medical malpractice action, plaintiff submitted an affidavit of merit by two obstetricians/gynecologists. The Court noted that "[f]or an expert to be qualified to testify regarding the standard of care, the expert must be qualified under MCL 600.2169(1). In this instance, plaintiff's experts, as obstetricians/gynecologists, did not qualify to testify regarding the standard of care applicable to defendant's nurse midwife because they did not practice in "the same health profession" as the nurse midwife. The Court ruled that "because nurse midwives are separately licensed professionals who practice nursing with specialty certification in the practice of nurse midwifery, obstetricians/gynecologists may not testify about their standard of practice or care."

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.24 Summary Disposition

B. Timing

On December 29, 2005, the Court of Appeals approved *Kemerko Clawson LLC v RXIV Inc* for publication. In the November 2005 update to page 175, replace the citation after the first sentence with the following citation:

Kemerko Clawson LLC v RXIV Inc, ___ Mich App ___, ___ (2005).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

G. Is Exclusion the Remedy if a Violation Is Found?

1. Good-Faith Exception

Insert the following text after the December 2005 update to page 348:

Even where a search warrant is based in part on tainted evidence obtained as a result of an officer's Fourth Amendment violation—"fruit of the poisonous tree"—the good-faith exception to the exclusionary rule may apply to evidence seized pursuant to the warrant if "an objectively reasonable officer could have believed the seizure valid." *United States v McClain*, 430 F3d 299, 308 (CA 6, 2005), quoting *United States v White*, 890 F2d 1413, 1419 (CA 8, 1989).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.22 Automobile Searches

D. Searching a Container Located in an Automobile

Insert the following text on page 351 immediately before subsection (E):

In the context of automobile searches, a computer may be considered a container of the data stored in the computer's memory. *People v Dagwan*, ____ Mich App ____, ____ (2005).

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

D. Imposition of Sentence

8. Fines and Costs

Effective January 1, 2006, 2005 PA 316 amended the Code of Criminal Procedure to add MCL 769.1k. Insert the following text on page 453 after the existing paragraph:

MCL 769.1k provides a general statutory basis for a court's authority to impose specified monetary penalties when sentencing a defendant and to collect the amounts owed at any time. MCL 769.1k states:

“(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

“(a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].

“(b) The court may impose any or all of the following:

“(i) Any fine.

“(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

“(iii) The expenses of providing legal assistance to the defendant.

“(iv) Any assessment authorized by law.

“(v) Reimbursement under [MCL 769.1f].

“(2) Subsection (1) applies regardless of whether the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.

“(3) The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under this section by wage assignment.

“(4) The court may provide for the amounts imposed under this section to be collected at any time.”